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No. 80-2110

In the Supreme Court of the United States

OCTOBER TERM, 1980

BIAGIO PINTO, a/k/a BOB PINTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded petitioner's case for resentencing on the surviving count of a multi-count indictment after it reversed his conviction on another count.

2. Whether petitioner's false statements to a federally insured bank were made in connection with an "advance" within the meaning of 18 U.S.C. 1014.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 646 F. 2d 833.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1981, and a petition for rehearing was denied on May 8, 1981. The petition for a writ of certiorari was filed on June 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of bank larceny, in violation of 18 U.S.C. 2113(b) (Count One), and on one count of making false statements to a federally insured bank, in violation of

18 U.S.C. 1014 (Count Two).[1] He was sentenced to five years' imprisonment on Count One and five years' probation on Count Two (Pet. App. A2). The court of appeals reversed the conviction on Count One, finding that petitioner's conduct lay outside the scope of activity proscribed by 18 U.S.C. 2113(b) (Pet. App. A4-A9). The court affirmed the conviction on Count Two and remanded the case with respect to the sentence on that count (Pet. App. A9-A12).

The trial evidence showed that petitioner was president of Pinto Trucking Service, Inc. (Trucking). Between 1972 and 1974, Trucking conducted business with a Japanese company, Nissin Unyu Soko (Nissin), totaling about $15,000 for the entire period (App. 47A-51A, 177A-178A, 323A).[2]

On June 5, 1974, Nissin instructed its bank in Japan, the Sanwa Bank Limited, to remit $193.51 to Trucking. Sanwa Bank did so by sending a telex communication to its American correspondent bank in the area, Philadelphia National Bank (PNB) (App. 116A-118A; Supp. App. 37A). In processing the telex from Sanwa Bank, however, PNB mistakenly interpreted the telex as a transmission of $193,511. Accordingly, $193,511 was charged to Sanwa Bank's account at PNB, and PNB contacted Trucking to determine how the money was to be handled (App. 58A-60A; Supp. App. 18A). Trucking, through its comptroller, instructed PNB to deposit the funds in Trucking's account at First Pennsylvania Banking and Trust Company, which PNB did (App. 60A-61A).

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[1]Petitioner was acquitted on a third count, which charged fraud under 18 U.S.C. 1343. This was petitioner's second trial; the trial judge set aside the verdict in the first trial, in which petitioner had been found guilty on all three counts, because the jury had considered extraneous material (Pet. App. A2 n.1).

[2]"App." refers to the Appendix filed in the court of appeals and "Supp. App." to the Supplemental Appendix in that court.

Because Trucking's comptroller was unable to document such a large receivable, he asked petitioner about it. Petitioner said the funds belonged to him, and he told the comptroller to put the money into an account comprising funds either due to petitioner from the company or due from petitioner to the company (App. 191A-192A, 196A-197A). Thereafter, petitioner directed that funds from that account be used to pay Trucking's creditors. Within 30 days, the entire $193,511 had been dissipated (App. 200A-201A).

By late September 1974, after some routine communications between PNB and Sanwa Bank concerning the discrepancies in their records, the original error was discovered. PNB immediately notified Trucking and demanded repayment of the difference (App. 74A-80A; Supp. App. 20A, 22A). On September 27, 1974, an independent auditor for Trucking called PNB to report that petitioner had assured him that Trucking had invoices for the $193,511 and that Trucking was entitled to the money (App. 81A-82A, 370A-372A). PNB again verified the telex mistake with Sanwa Bank, sent copies of the verification to Trucking's attorney, and again demanded repayment. Trucking's attorney nevertheless responded that Trucking still believed that it was entitled to the funds (App. 84A-88A; Supp. App. 27A). At a meeting with a loan officer from First Pennsylvania on October 2, 1974, petitioner again insisted that the Japanese firm owed Trucking the entire $193,511 (App. 152A-159A; Supp. App. 145A).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals had no authority to vacate the sentence imposed under 18 U.S.C. 1014 and remand for resentencing in light of the reversal of his conviction on another count. He also claims (Pet. 10-11) that the decision below conflicts with a long line of decisions holding that a legal sentence on a

surviving count may not be changed after convictions on other counts have been reversed on appeal, without violating the Double Jeopardy Clause of the Fifth Amendment.

a. Petitioner's claim is not presently ripe for review by this Court because the district court has not yet determined whether he should be resentenced. The district court is not obligated to resentence petitioner to a different sentence on the Section 1014 count; the court of appeals held only that "the prosecution may apply to the district court for resentencing on [Count Two]" (Pet. App. A12). If the district court leaves the Section 1014 sentence unchanged, petitioner's claim will be moot. In these circumstances, this Court's review of the instant petition would be premature.

b. Furthermore, in view of recent developments in the area of double jeopardy law, we believe that the Court should not now undertake to consider this issue. Petitioner claims that the Third Circuit, both here and in *United States* v. *Busic*, 639 F. 2d 940 (1981), cert. denied, No. 80-6379 (June 8, 1981), has departed from the previously unanimous view of the courts of appeals that vacation and remand of a legal sentence would violate the Double Jeopardy Clause (Pet. 10-11). Yet all of the cases upon which petitioner relies were decided before this Court's recent decision in *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980), which strongly supports the constitutionality of the resentencing that the court of appeals has authorized here.

In *DiFrancesco*, the Court rejected a double jeopardy attack upon a statute which authorized the government, in certain circumstances, to seek appellate review of a sentence on the ground that it should have been more severe. See 18 U.S.C. 3576. The Court held that "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase" (slip op. 20). Nor does a defendant have the "right to know at *any* specific

moment in time what the exact limit of his punishment will turn out to be" (*id.* at 19, emphasis supplied) (see Pet. 16-17). It was in light of the Court's decision in *DiFrancesco* that the Third Circuit in *Busic* re-examined its previous position and concluded that the Double Jeopardy Clause does not prohibit resentencing on surviving counts of a multi-count conviction "when the sentence has been spread erroneously over counts that have been declared invalid" (639 F. 2d at 947-948). As the Third Circuit explained, when a trial court's sentencing plan is based on an aggregate conviction, reversal of one or more counts may thwart the entire structure of the interdependent sentence, and a complete resentencing may therefore "reduce the possibility of disparate and irrational sentencing" (*id.* at 948).

Contrary to petitioner's assertion (Pet. 11), a petition for a writ of certiorari was filed in *Busic* (No. 80-6379), and certiorari was denied on June 8, 1981.[3] The Second Circuit has also changed its position on this issue on the authority of *DiFrancesco*, and this Court denied certiorari in that case as well. *McClain* v. *United States*, 643 F. 2d 911, 913 (1981), cert. denied, No. 80-6536 (June 8, 1981). These developments suggest that the other courts of appeals may also reconsider their previous holdings as this issue again comes before them.[4]

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[3]Furthermore, we are advised by the United States Attorney for the Western District of Pennsylvania that in fact the district court in *Busic* declined the opportunity given by the court of appeals to increase the defendants' sentences on the surviving counts, thus rendering moot the issue sought to be presented interlocutorily to this Court in that case. As we have noted, the same outcome is possible here, and that possibility alone dictates denial of the present petition.

[4]In fact, in several cases that were decided before *DiFrancesco* the courts of appeals have remanded for resentencing in similar circumstances. *United States* v. *Hodges*, 628 F. 2d 350, 352-353 (5th Cir. 1980); *Johnson* v. *United States*, 619 F. 2d 366, 368-369 (5th Cir. 1980); *United States* v. *Moore*, 540 F. 2d 1088, 1091 (D.C. Cir. 1976); *Kitt* v.

Moreover, the contrary decisions of the courts of appeals upon which petitioner relies (Pet. 10-11) are premised upon the courts' interpretations of *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *United States* v. *Benz*, 282 U.S. 304 (1931). In *DiFrancesco* (slip op. 20-22), this Court clarified the meaning of those cases, noting that they "are not susceptible of general application" and confining them "to *Lange*'s specific context," where the defendant received a greater sentence than the legislature had authorized.

Petitioner would distinguish (Pet. 16) *DiFrancesco* on the ground that there, unlike here, a statute explicitly authorized appellate review of the sentence. Thus, petitioner argues (Pet. 12-13) that there was no legal authority for the court of appeals' action here. Although the Third Circuit did not cite any specific statutory authority in remanding for resentencing on Count Two, there is ample authority for this action in 28 U.S.C. 2106, which grants general supervisory powers to the federal appellate courts in connection with their disposition of appeals. See *McClain* v. *United States*, *supra*, 643 F. 2d at 914.[5]

Thus, the court of appeals had authority to remand for resentencing, and there is not at present any conflict among the circuits that warrants immediate resolution by this Court. Although review may be necessary in the future, we

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United States, 138 F. 2d 842, 843 (4th Cir. 1943); *Phillips* v. *Biddle*, 15 F. 2d 40, 41 (8th Cir. 1926). Thus, the contrary authority upon which petitioner relies (Pet. 10-11) was not as well settled as he claims.

[5]Petitioner's further point (Pet. 13) that the court of appeals did not actually vacate the sentence, and that the district court has no such authority, is also unpersuasive. The court of appeals was explicit in its order that the purpose for the remand was "so that the prosecution may apply to the district court for resentencing with respect to Count II" (Pet. App. A14). Thus, the court of appeals obviously authorized further action by the district court, as it may do under 28 U.S.C. 2106.

believe that the interests of justice and judicial economy will be advanced if such review awaits further developments in the lower courts.[6]

2. Petitioner also contends (Pet. 18-21) that the transmission of funds to Trucking's First Pennsylvania Bank account was not an "advance" within the meaning of 18 U.S.C. 1014. Petitioner claims that this statute was intended to apply only to transactions involving consensual extensions of credit by federal agencies or by institutions insured by federal agencies. This argument is without merit.

As the court of appeals observed, the term "advance" in 18 U.S.C. 1014 has nowhere been specifically defined. However, the statute's use of the term "advance" in addition to the word "loan" implies that the former has some additional meaning beyond that of "loan" (Pet. App. A11). When enacting Section 1014, Congress intended that the language used in the statute would be given its common and accepted meaning. *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (10th Cir. 1978). Among the many common meanings attributed to the word "advance" is that of "furnishing money or goods for others in expectation of reimbursement." *Black's Law Dictionary* 48 (5th ed. 1979). Here, PNB furnished money to Trucking's account at First Pennsylvania, for Sanwa Bank, in expectation of reimbursement by Sanwa Bank. Indeed, before PNB deposited the

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[6]Petitioner also attempts (Pet. 14-15) to distinguish this case from *United States* v. *Busic*, *supra*, by arguing that he was convicted of two separate and independent offenses, whereas the issue arose in *Busic* in the context of a divided sentence for a single offense, an armed assault of federal officers. Any distinction between these two cases on that point is immaterial. While the false statement charge in this case may technically rest on an act separate from the initial fraudulent conversion of the funds, the entire prosecution here was based on essentially one course of conduct, which happened to violate more than one criminal statute.

money in First Pennsylvania Bank, it put a hold on Sanwa Bank's PNB account to obtain immediate reimbursement. When PNB eventually had to refund the excess money to Sanwa Bank, it still retained an expectation of reimbursement from Trucking.

Moreover, several decisions have interpreted the statute broadly as intended to include activities beyond those involved in traditional loan agreements. In holding that the statute included an oral statement in which a defendant falsely claimed that he had deposited sufficient funds in another branch of the bank to cover a check he had written, the Tenth Circuit determined in *United States* v. *Stoddart, supra*, 574 F. 2d at 1053, that "[t]he purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss." Likewise, in *United States* v. *Bush*, 599 F. 2d 72, 75 (5th Cir. 1979), the court held that Section 1014 extends to "all material false statements * * *, even when the false statements are given with the knowledge, consent or duplicity of a bank officer." The Third Circuit's holding on this issue was correct and it does not conflict with any other appellate court decision construing 18 U.S.C. 1014 or otherwise warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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